IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 45

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

Appellants,

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellees.

Appeal From the United States District Court for the Northern District of California. Northern Division

BRIEF FOR APPELLEES

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MISCELLANEOUS

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OPINION BELOW

The opinion of the United States District Court for the Northern District of California, Northern Division, is reported in 197 F. Supp. 780.

JURISDICTION

Handlers'[1] action was brought under 28 U.S.C. 1331 and 1337 to enjoin state officers[2] from enforcing California Agricultural Code, Section 792, as being unconstitutional and in conflict with an act of Congress regulating commerce. R. 1-42. Final judgment dismissing handlers' action on the merits was entered September 22, 1961. R. 783. Handlers' notice of direct appeal was timely filed in the district court on October 10, 1961 (R. 78), and probable appellate jurisdiction of the appeal was noted by the Court on January 15, 1962. 368 U.S. 964. The Honorable Homer T. Bone, United States Circuit Judge, and Louis E. Goodman and Sherrill Halbert, United States District Judges, heard the evidence presented at the trial February 7 and 8, 1961, and signed the memorandum opinion of the district court, filed July 12, 1961, which directed entry of judgment for state officers who were to prepare proposed findings, judgment, and any necessary orders. R. 557-685, 757-69. Judge Louis E. Goodman died on September 25, 1961. R. 784. Therefore, only Judge Bone and Judge Halbert signed the Findings of Fact and Conclusions of Law filed September 20, 1961 (R. 778-81), the order ruling on the evidenciary objections which were reserved by state officers, the order on substitution of party defendants filed September

[1] Florida Lime and Avocado Growers, Inc. and South Florida Growers Association, Inc. hereafter referred to as "handlers."

[2] Charles Paul, Director of Agriculture, Edmund G. Brown, Governor, and Stanley Mosk, Attorney General, hereafter referred to as "state officers."

21, 1961 (R. 782-83), and the judgment entered September 22, 1961. R. 783-84. State officers in their motion to dismiss the appeal, expressed doubt that handlers' application for injunction had been both "heard *and determined*" by a district court of three judges under 28 U.S.C. 1253, 2281. (Emphasis added.) Since the Court has noted probable jurisdiction of the appeal (368 U.S. 964), state officers assume that the Court has initially decided that the application for injunction was "determined" by the memorandum opinion signed by three judges, even though only two judges participated in the settlement of the findings which followed the tenor of the memorandum opinion. R. 757-69, 778-81. Compare *Ayrshire Corp.* v. *United States*, 331 U.S. 132, and *Cumberland Tel. Co.* v. *Pub. Serv. Commission*, 260 U.S. 212 with *Dohany* v. *Rogers*, 281 U.S. 362, 369-70 (1930). The Court, presumably, therefore, has appellate jurisdiction of the appeal under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Do the self-help avocado size and weight restrictions on the handling of avocados grown in south Florida, initiated by Florida avocado growers and handlers and issued by the Secretary of Agriculture, invalidate the California Avocado Inspection Law?

2. Is California Avocado Inspection Law in conflict with, or pre-empted by, Federal Marketing Agreement Act of 1937?

3. Is the California Avocado Inspection Law, which requires that avocados contain 8 percent oil, unconstitutional under the Commerce Clause or the Equal Protection Clause as applied to avocados grown in Florida and marketed in California?

STATUTES INVOLVED

California Agricultural Code, Section 792, provides:

> "Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.
>
> "'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.
>
> "All avocados at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

Pertinent provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, et seq. are set forth in the Appendix.

STATEMENT

1. Summary of the Evidence.

Handlers are Florida corporations which market avocados. R. 554, 689; D. Ex. A, R. 123-125, 643, 688, 782; D. Ex. B, R. 120-122, 643, 688, 782. Their

complaint sought injunction restraining state officers from enforcing California Agricultural Code, Section 792, on the ground of its invalidity as applied to handlers' avocados under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, and as unconstitutional under the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment of the Constitution. R. 1-42.

Agricultural Code, Section 792, provides:

> "Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.
>
> "'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.
>
> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

This 8 percent oil content requirement was enacted by the California Legislature in 1925. Calif. Stats. 1925, Ch. 350, pp. 625, 633. The purpose of the law is to prevent the sale to consumers of immature avocados. R. 628. This inspection law is applied equally to both California and Florida avocados. R. 632. Avocados originating in Florida are inspected at the California destination point of the truck or

railroad car. R. 630. Shipments normally contain sized boxes of avocados, i.e., each size is packed in its own container. R. 633. Avocados that fail to meet the 8 percent oil content standard are generally discovered at the beginning of each variety's harvesting season, and such immature avocados are usually found in the smaller sizes of fruit. R. 633, 642. The handler, or other person in possession of the lot, is given an opportunity to bring the lot into compliance by removing the immature fruit. R. 633. These immature avocados may then be reshipped out of the State. R. 633. Handlers expressly conceded that the state-prescribed oil test is accurate (R. 630) and that there is no dishonesty in the enforcement of the state act. R. 672.

On the basis of the testimony and exhibits admitted into evidence, the three-judge district court entered detailed findings of fact. These findings were that avocados are harvested for commercial marketing in a hard inedible state. R. 591-92, 628, 664, 779; 197 F. Supp. 780, 782. After purchase by the consumer, they are allowed to soften and ripen. R. 628, 779. If the avocado is immature when picked, it will shrivel, become rubbery in texture, bitter in taste and useless as food. R. 592, 628, 665, 779. On the other hand, if picked when mature, the avocado softens into palatable, edible fruit. R. 592, 648, 779.

However, there is a temptation for growers to harvest their avocados early in the season when the fruit is in short supply and the market price is correspond-

ingly high, even though such avocados may be in an immature state. R. 618-19, 628, 665-66, 779; 19 F.R. 2419. But because avocados are harvested and marketed in a hard state, consumers and retail grocers cannot determine whether the avocados offered for sale are mature enough to soften into palatable, edible fruit. R. 628, 779.

Other than water, oil is the chief constituent of avocados. R. 608, 648, 779. This oil content increases along with palatability, as the fruit grows in size. R. 629, 633, 779. Because of this close relationship between oil content and the maturation of the fruit, oil content has been found to be the best available index of maturity of the avocado. R. 628-29, 648, 666, 779.

Avocados grown in south Florida are grouped into three classifications: (1) varieties which trace their origin to parent trees in Guatemala, (2) varieties which are hybrids developed from crossing strains from parent trees in the West Indies with strains from parent trees in Guatemala, and (3) varieties tracing their origin to parent trees in the West Indies. R. 588, 779. The hybrid and Guatemalan varieties in the 1959-1960 shipping season (March 31, 1959- March 31, 1960) constituted more than 88 percent of total south Florida avocado shipments and are of increasing commercial importance. D. Ex. E, R. 488-92, 643-44, 780, 782. These hybrid and Guatemalan varieties attain oil content as high as 20 percent while in prime marketing condition. R. 587. These major commercial

varieties of avocados grown in Florida have been marketed in California in the past. R. 678.

The West Indian varieties of Florida avocados generally do not attain 8 percent oil content. R. 590, 780. But the West Indian varieties have such poor shipping qualities and short retail grocery store "shelf-life" that it is not commercially feasible to transport them across the continent for marketing in California, without regard to the State's 8 percent oil content statute. R. 604-05, 666-67, 676-77, 780. These West Indian varieties are of declining commercial importance having dropped to less than 12 percent of total south Florida shipments in the 1959-1960 shipping season. D. Ex. E, R. 48-492, 780, 782.

The district court found that the California 8 percent oil standard was reasonable as applied to the hybrid and Guatemalan avocado varieties. R. 780. The applicability of the state statute to the West Indian varieties is hypothetical because these latter varieties have such poor shipping qualities and such a short "shelf-life" in the retail grocery store that their transportation from Florida to California for marketing would not be commercially feasible. R. 667, 676, 780; 197 F. Supp. 780, 786.

2. Proceedings in the Trial Court.

No officer or employee of either handler testified at the trial held February 7 and 8, 1961. R. 557-685. Handlers' entire case consisted of the testimony of a single witness, Paul Louis Harding, Supervisory

Plant Physiologist, United States Department of Agriculture. R. 558-59. His testimony related to the palatability and maturation of Florida avocados. R. 558-622. Handlers at the trial also offered in evidence *en masse*, and without reading, the complete deposition transcripts of five witnesses, totaling 205 pages in the printed record, together with the attached exhibits of 92 pages. R. 146-445 (O.P.),[3] R. 576. Included in the depositions was the testimony of Harold E. Kendall, President of plaintiff South Florida Growers Association, Inc. (R. 251-314 (O.P.)), and the testimony of Fred Piowaty, Secretary and Sales Manager of plaintiff Florida Lime and Avocado Growers, Inc. R. 314-332 (O.P.). State officers promptly objected on the grounds that the depositions should be read by handlers question and answer at a time, and that the exhibits should be offered in evidence individually, in order that previously prepared specific objections could be made. R. 576. These objections were renewed by state officers at the conclusion of the handlers' case (R. 625) and again at the conclusion of the trial. R. 683-84. The district court at the trial reserved ruling on the admissibility of these depositions and exhibits pending the filing of the written argument of counsel. R. 576, 625, 683-84. Thereafter, following the filing of trial briefs (R. 692-756), the district court ruled on the reserved objections and held that handlers' depositions and their attached exhibits were excluded from

[3] Testimony and exhibits not admitted into evidence, but included in the record as an offer of proof are designated "R. ——— (O.P.)."

evidence. R. 782. Handlers also offered into evidence *en masse* handlers' exhibits 23, 24, 25 and 26 for identification. R. 446-87, 576, 583, 603. The district court reserved ruling on their admissibility pending written argument of counsel. R. 603. After considering state officers' objections (R. 722-726) the district court excluded these exhibits for identification from evidence. R. 782. Because handlers' depositions and exhibits were excluded from evidence by the district court, there is *no* evidence that handlers have ever experienced difficulty in marketing their avocados in California. R. 782. Thus, there is no evidence that they have suffered any injury as a result of the California inspection statute or that they have been threatened with any injury. R. 780.

Because of handlers' reliance on matters excluded from evidence, their brief shows an almost total absence of "appropriate references to the printed record" as required by Supreme Court Rule 40(1)(e). When references are given, they usually refer to matters not in evidence. A summary of the references in handlers' brief to matters not in evidence is set forth in the appendix at page 62 et seq.

At the conclusion of the trial state officers stated to the district court that they had rebuttal evidence to adduce if any of handlers' depositions and attached exhibits were admitted into evidence. R. 684. The court then announced that state officers would be given an opportunity to rebut the evidence set forth in handlers' offer of proof if such material were re-

ceived in evidence. R. 684. In support of their right to adduce rebuttal evidence, state officers made an offer to prove through chemists A. J. Bingham, J. B. La Clair, Frederick L. Delano and Archie Shannon, that the oil test method utilized by handlers' deposition witnesses was faulty in that the test method (1) failed to recover all the available oil in the Florida avocados tested, and (2) produced erratic oil tests. R. 707-12, 749-56. These faulty test results were caused by the substitution of an inexpensive household Waring blendor (pictured at R. 749) for the heavy-duty ball grinder (pictured at R. 95, 750) prescribed by California regulation. R. 93, 708. Mechanically, the shearing action of the whirling blades in the blendor failed to break all of the pulp cells containing the avocado oil, while, in contrast, the steel balls in the grinder crushed the pulp cells so as to release all of the available oil for measurement. R. 708. State officers' offer of proof is relevant since it would discredit the testimony of handlers' witnesses who relied on the faulty oil test method. R. 621-22. The district court did not have occasion to consider state officers' offer of proof since it excluded from evidence handlers' depositions and attached exhibits. R. 782.

On the merits, the district court found that the California inspection statute was constitutionally valid under the Commerce Clause and under the Equal Protection Clause of the Fourteenth Amendment. R. 781. The California act also was found to be consistent with the Agricultural Marketing Agreement

Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 et seq., and with the marketing regulations for avocados grown in South Florida. 7 C.F.R. 915. Handlers' action was therefore dismissed on the merits by formal judgment entered September 22, 1961. R. 783-784.

SUMMARY OF ARGUMENT

I

California's avocado inspection law, which prohibits the sale in California of avocados containing less than 8 percent oil, violates neither the Commerce Clause nor the Equal Protection Clause.

The law was enacted in 1925 to remedy a local situation—the deception of consumers by the marketing of immature avocados and the resulting detriment to avocado growers.

The problem of immature avocados was a serious one because avocados are picked and sold to consumers in a hard state, and mere physical appearance does not indicate whether an avocado will ripen into a soft, palatable fruit or will shrivel and become rubbery and bitter. In order to remedy this situation, the California Legislature prohibited the sale of avocados containing less than 8 percent oil. For 37 years this 8 percent standard has effectively prevented the marketing of immature avocados in California.

A statute designed to remedy a local situation is valid under the Commerce Clause, even though it may incidentally affect interstate commerce. In *Milk Board* v. *Eisenberg Co.*, 306 U.S. 346, 352, this Court

observed that "the purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers in Pennsylvania" and concluded that the burden it imposed on interstate commerce—the payment of minimum prices to Pennsylvania producers—was constitutionally permissible.

In the recent case of *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, this Court emphasized again that the Commerce Clause leaves the states with broad powers to regulate commerce. This Court held that Detroit could enforce its Smoke Abatement Code against vessels moving in interstate commerce even though compliance would require structural alteration of the vessels.

Handlers in the present case concede that the California avocado inspection law is administered in an honest and nondiscriminatory manner. They maintain, however, that the 8 percent standard is inherently discriminatory against interstate commerce because, so handlers argue, the varieties of avocados grown in Florida, unlike the varieties of avocados grown in California, become mature when the oil content is less than 8 percent.

The facts do not support handlers' argument. Avocados grown in Florida may be divided into three classifications—Guatamalan varieties, hybrid varieties, and West Indian varieties. The district court found that the Guatamalan and hybrid varieties do attain or exceed 8 per cent oil content while in a prime

marketing condition. With respect to the West Indian varieties, the district court found that it was not commercially feasible to ship them across the continent to California, even in the absence of any California law, because of their poor shipping qualities and short retail store shelf-life. The Court also found that the West Indian varieties constituted only 12 percent of the total Florida shipments in the 1959-60 season and are declining in commercial importance.

The Equal Protection Clause does not require perfection. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-89. The single standard of 8 percent chosen by the California Legislature is both reasonable and workable.

II

California's avocado inspection law does not conflict with the Agricultural Marketing Agreement Act of 1937.

As in *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 444-46, there is no conflict between legislative objectives. The objective of the California statute is to prevent the deception of consumers by the marketing of immature avocados. The stated objective of the federal act is "to establish and maintain such orderly marketing conditions for agricultural commodities as will establish, as the prices to farmers, parity prices . . . ." Sec. 2(1), 7 U.S.C. Sec. 602(1).

Nor is California's avocado inspection law preempted by the Agricultural Marketing Agreement Act of 1937. Both the language and legislative history of

the act show that Congress did not intend to supplant state law. In *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 542, this Court marked the limits of the act in the following manner. "We assume, though it is not necessary to decide, that the Federal [Marketing Agreement] Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the Commerce Clause."

A federal inspection certificate simply indicates compliance with federal law, and does not exempt goods from state police power requirements. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446-48; *Kake Village* v. *Egan*, 369 U.S. 60, 63-64. The present case is similar to *Reid* v. *Colorado*, 187 U.S. 137, where this Court held that Colorado could require cattle coming from Texas to be inspected for disease by a Colorado official, even though a federal official in Texas had previously inspected the cattle and certified that they were free from disease. *Campbell* v. *Hussey*, 368 U.S. 297, is inapposite because there the Court found a legislative intent to pre-empt state law.

Marketing orders have been aptly described by the United States Department of Agriculture as "self-help programs." Marketing Order No. 915 (formerly No. 969) regulating the handling of avocados grown in southern Florida is typical.

The growers of avocados in southern Florida voted for the marketing order in 1954. During each season, regulations are periodically issued which designate

starting dates for marketing avocados of a particular variety and minimum weight or diameter. E.g., 27 F.R. 9174-75. These regulations are issued as a matter of course upon the recommendations of the Avocado Administrative Committee, which is composed entirely of growers and handlers from southern Florida. Although handlers must generally submit their avocados to the Federal-State Inspection Service for inspection and certification of compliance with the applicable regulations, the Avocado Administrative Committee may issue exemption certificates upon proof "satisfactory to the committee" that the avocados are "mature." 7 C.F.R. Sec. 915.53.

In view of the extent to which private industry may formulate and administer marketing programs, including the southern Florida avocado program, one must conclude that Congress did not intend these programs to operate free of state law.

III

The correctness of the district court's order excluding various depositions and exhibits offered in evidence by handlers is not fairly comprised within their statement of the questions presented. *Roth* v. *United States*, 354 U.S. 476, 490 n.27. Nor is the order "plain error." See U.S. Sup. Ct. Rule, 40(1)(d)(2). The district court was correct in sustaining state officers' objection to an *en masse* introduction of five depositions 205 pages long. *Los Angeles Trust Deed & Mtg. Exch.* v. *Securities & Exchange Comm'n*, 264 F.2d

199 (9 Cir.). The district court was also correct in sustaining the multitude of objections to handlers' exhibits 1 through 26.

ARGUMENT

I. The Judgment That the California Avocado Inspection Law Is Constitutional Is Supported by the Findings, and the Findings Are Supported by the Evidence.

The "Questions Presented" for review in handlers' brief do not question that substantial evidence supports the findings of the district court. Brief for Appellants, No. 45, pp. 3-5. Handlers' brief, in its discussion of the Commerce Clause, does mention, in passing, Findings Nos. 4, 8, 10 and 11. Brief for Appellants, No. 45, pp. 62-65; R. 779-80. Silence regarding the balance of the findings is a tacit admission that Findings Nos. 1, 2, 3, 5, 6, 7, 9, 12 and 13 are supported by the evidence. These findings are:

> "1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.
>
> "2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

"3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

"5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

"6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

"7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

"9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

"12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Growers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

"13. Plaintiffs have neither suffered, nor been threatened with irreparable injury." R. 778-780.

Handlers point to no exception which permits them to obtain a trial of the facts *de novo* in this Court. The findings of the district court with respect to the economics of avocado marketing and the biology of the avocado depended upon the credibility of the expert witnesses produced by each party at the trial. The three judges listened to their testimony, observed their demeanor, and found that the evidence on behalf of state officers was "more convincing and entitled to greater weight." 197 F. Supp. 780, 784. "Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'" *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (direct appeal from a district court); see Fed. R. Civ. P. 52(a): "Findings of fact shall not be set aside unless clearly

erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See H.R. Doc. No. 588, 75th Cong., 3d Sess., 46-48 (1938).

Finding No. 4 of the district court states:

> "4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high." R. 779.

Handlers assert that this finding "flaunts the evidence that no varieties of Florida avocados attain 8 percent oil content with the timeliness and consistency essential for effective participation in the California market." Brief for Appellants, No. 45, pp. 64-65. In support of this argument, which state officers dispute, handlers give record citations to exhibits and depositions excluded from evidence. For example, plaintiffs' exhibits 17 and 21 for identification (R. 438-439 (O.P.), 443-444 (O.P.)) were excluded from evidence, as was the deposition of handlers' witness Harkness (R. 208-250 (O.P.)) R. 782; see Brief for Appellants, No. 45, p. 65. The testimony of handlers' witness Harding (R. 558-622), also cited, carried little weight with the district court. 197 F. Supp. 780, 784; see Brief for Appellants, No. 45, p. 65.

This finding that growers are tempted to pick avocados in an immature state of development in order to secure a high price is supported by evidence that the low point in California avocado production and mar-

keting occurs in the months of September, October and November. R. 665-666. California prices for avocados are thereafter depressed as the Fuerte variety matures and reaches the market. R. 666. The Fuerte is the leading California variety. R. 634. To illustrate, the f.o.b. Los Angeles price for a 13-pound net weight container of avocados ranged from $4.50 to $5.50 in September and October, 1960. R. 665-666. This price broke in mid-November, 1960, under the depressing effect of the marketing of Fuertes in large volume. R. 666. By early February, 1961, the price range for the 13-pound container was down to $2.75 to $3. R. 665.

Handlers thus have a powerful economic incentive to get into the California market ahead of the California Fuerte crop. What handlers would obviously like to do is to sell their avocados on the California market at a time when there is minimum competition from California avocados, even though their Florida avocados may not have reached their full maturity. Competition from immature California avocados would be prevented by the State's 8 percent oil statute which handlers here seek to nullify as to Florida avocados.

The existence of this temptation to market avocados prematurely is confirmed by the Secretary of Agriculture who found that many Florida handlers "have varied their individual grade standards to reflect variations in the supply, quality, and demand for Florida avocados during a particular season. Thus,

Florida avocados of undesirable quality frequently have been marketed in a manner designed to indicate that such avocados were of desirable quality." 19 F.R. 2419. Clearly then, finding No. 4 is supported by substantial evidence.

Handlers' brief No. 45 at page 63 also attacks finding No. 8 as being "unsupported by substantial evidence." In this finding, the district court found that:

> "8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season." R. 780.

The Waldin, Pollock, Fuchs and Trapp varieties listed in defendants' exhibit E (R. 488-492, 643, 644, 782) were identified as the leading West Indian varieties. R. 590, 669. The volume of commercial shipments of these varieties from south Florida dropped from 19.15 percent of total Florida commercial shipments in the 1955-1956 shipping season to 10.55 percent in the 1959-1960 shipping season. D. Ex. E, R. 488-492, 643, 644, 782.[4] The fact that commercial shipments of these varieties have lessened in recent years

[4] D. Exhibit E combines the Pollock with the Simmonds variety for the 1955-1956 south Florida shipping season, but because of reduced production only the Simmonds variety appears for the 1959-1960 shipping season. R. 488, 492, 643, 644, 782.

indicates reduced commercial importance. The decline in shipments can, no doubt, be attributed to the marketing disadvantages of the poor shipping qualities and "shelf life" of these West Indian varieties. R. 604-605, 666-667, 676-677.[5]

Finding No. 10 by the district court recites:

> "10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute." R. 780.

This finding is supported by the testimony, unrefuted, of Presley Wiggs, Assistant General Manager of Calavo Growers of California, who had personal experience in the marketing of Florida avocados from 1939 to 1957. R. 663-664. Wiggs testified that "it would not be commercially profitable to market West Indian varieties grown in Florida in California. The best or shortest in transit time that you can expect by refrigerated truck from Florida to California is five days. If fruit on that truck were presold . . . it would take probably another two or three days to dispose of that fruit. If it were not presold . . . it would take five or more days. This [distribution interval in California], plus the transit time of a minimum of

[5] It is interesting to note that a University of Florida publication describes West Indian varieties of avocados, such as Pollock, Fuchs, and Trapp, as "least hardy." Ruehle, *The Florida Avocado Industry*, U. Fla. Agricultural Experiment Stations, Bull. 602, p. 22 (Nov. 1958).

five days I believe would result in fruit which would not give satisfaction at the retail level. In my experience I have noted a tendency for West Indian varieties to break down quite rapidly after they have been removed from cold storage . . . . From that point on they ripen quite fast. So that the retailer, who is primarily interested in making a profit, does not have sufficient time to turn their merchandise and make a profit." R. 667.

The testimony of Wiggs was corroborated by the testimony, also unrefuted, of Albert C. Jones, sales manager for Western Fruit Growers Sales Company of California, who had sold Florida varieties of avocados in the southwestern United States beginning in 1951. R. 675. Jones testified that the West Indian varieties have the poorest shipping qualities. R. 676. Again, the district court's finding is fully supported by the record.

Finding No. 11, cited in handlers' brief at page 64, states:

> "11. The California 8% oil content requirement is effective in keeping off the market immature avocados of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit." R. 780.

Again, handlers simply refuse to accept that their exhibits 17 and 21 for identification and the deposition of Harkness were excluded from evidence by express order of the district court. R. 782. The argument, set out in handlers' brief No. 45 at pages 64 and 65, that this finding is inconsistent with these excluded exhibits and deposition must obviously be disregarded. *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 518. Further, the finding is supported by direct testimony that the California inspection statute was effective in keeping immature avocados from being sold to California consumers. R. 631, 648, 666. The finding that the hybrid and Guatemalan varieties grown in Florida attain or exceed 8 percent oil content while in prime commercial marketing condition is supported by the testimony that Florida varieties, other than West Indian, reach an oil content as high as 20 percent while yet marketable and palatable (R. 587), that the Lula, Booth 7, Booth 8 and Linda varieties exceed 8 percent in oil content at maturity. R. 616-17.

In summary then, handlers make no claim that the findings are not supported by the evidence, with the exception of passing comment on four findings. As to these four, it is clear that substantial evidence in the record supports them. These findings, discussed hereafter, amply demonstrate the constitutionality of the state statute.

II. The California Avocado Inspection Law, Which Requires That Avocados Sold in the State Contain 8 Percent Oil, Is Constitutional Under the Commerce Clause and Under the Equal Protection Clause of the Fourteenth Amendment.

A. THE CALIFORNIA INSPECTION LAW DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE.

California's avocado inspection law has been in effect for 37 years. Calif. Stats. 1925, Ch. 350, pp 625, 633. The legislative objective was to protect consumers by preventing ". . . deception in the . . . sale of fruits, nuts and vegetables . . . ." *Id.* at 625; R. 628.[6] Avocados are picked and marketed in a hard state, at which time it is not easy to tell whether the fruit is mature. R. 628, 779. If the avocado is immature, it will shrivel up and become rubbery and unpalatable, with an unpleasant aftertaste. R. 628,

[6] A 1930 University of California study stated:

"In order to provide for uniformity in the maturity of the fruit at the time of harvesting and especially to prevent the sale of immature avocados, a practice which had become a menace to the industry, the California avocado growers in 1925 succeeded in having a state maturity standard of 8 percent fat or oil content established. This action has been productive of very great benefit to the industry in that it has effectively eliminated immature fruit, mostly windfalls or stolen fruit, from the markets." Hodgson, *The California Avocado Industry*, U. Cal. Agricultural Extension Service, Circular 43, p. 39 (April 1930).

See also, Stahl, *Changes In Composition of Florida Avocados In Relation to Maturity*, U. Fla. Agricultural Experiment Station, Bull. 259, p. 3 (May 1933):

"There is a tendency to harvest the avocado before it is mature enough to ripen normally, which results in putting a poor and flavorless product in the hands of the consumer. If picked too early, the characteristic good flavor of well-matured fruit is lacking and the fruit becomes rubbery, shrivelled, and darkened."

665, 779. Therefore, to prevent the marketing of immature avocados, the California Legislature adopted an oil content standard which expert opinion considers to be the best standard available. R. 648. David Appleman, Professor of Plant Nutrition at the University of California, positively testified that: "In my opinion it [oil content] is as good an index as we can have at present." R. 648.[7]

The California requirement was fixed at 8 percent because the oil content of avocados increases as the fruit matures on the tree, and fruit having 8 percent of oil when picked was found to soften normally into palatable fruit. R. 629, 648. Avocados with less than 8 percent oil content failed to soften normally and remained unpalatable. R. 648.

The burden of identifying those avocados which upon test will meet the 8 percent California maturity requirement falls alike on California and Florida handlers. R. 640. Since avocados increase in oil content during the period of growth, the problem is to obtain accurate oil tests as the avocados approach and reach maturity. R. 585, 629, 633, 779. California handlers perform their own continuous oil tests at their packing houses and start harvesting when the fruit reaches an 8 percent oil content. R. 670-671.

[7] Professor Appleman's opinion is supported by a University of Florida research study which found that "The fat content seems to be the best indication of maturity of the avocado. This can be very readily correlated with the maturity of the fruit." Stahl, *Changes In Composition of Florida Avocados In Relation to Maturity*, U. Fla. Agricultural Experiment Station, Bull. 259, p. 39 (May 1933).

Handler South Florida Growers, Inc., also maintain a laboratory in its packing house. R. 680. Through the use of a refractometer and a ball-grinder machine by easily trained employees, this handler could make the necessary oil tests in Florida from appropriate random samples taken from graded, sized, and packed fruit. R. 680-681. Handler Florida Lime & Avocado Growers, Inc. could easily do the same. There is an increase in the oil content of avocado fruit of between 1 and 2 percent after picking. R. 653-54. By shipping to California avocados which tested 8 percent oil at the packing house, handlers would have a margin of safety insuring that such fruit would pass inspection upon arrival in California.

No claim is made by handlers that the California law is enforced dishonestly against them (R. 673), and it is conceded that the prescribed California oil test method is accurate. R. 93-97, 630, 748. The only issue is the assertion that the state inspection law is "inherently discriminatory." R. 673. This claim by handlers has no foundation in the record. The trial court found that the hybrid and Guatemalan varieties, which constitute approximately 88 percent of total Florida commercial shipments and are of increasing commercial importance, attain or exceed 8 percent oil content while in prime commercial marketing condition. Findings Nos. 9 and 11. R. 780. This finding has ample support in the record. Even Harding, the sole witness produced by handlers, testified that these va-

rieties attain oil content as high as 15 to 20 percent while palatable and marketable. R. 587.

Handlers' claim that California's avocado inspection statute operates to exclude Florida avocados from the California market is reduced for support to the West Indian varieties. It is true that those varieties do not generally attain 8 percent oil content until they are past their prime condition. R. 590, 780.

But the applicability of the State's inspection statute to the West Indian varieties of avocados is hypothetical for the reason that the West Indian varieties have such poor shipping qualities and such a short "shelf life" in the retail grocery stores, that their transportation across the continent from Florida to California for marketing would not be commercially feasible. R. 667, 676, 780. Moreover, these West Indian varieties are of declining commercial importance, having dropped to less than 12 percent of total south Florida shipments in the 1959-1960 shipping season. D. Ex. E, R. 488-492, 643, 644, 780, 782.[8]

It is possible, claim handlers, that shipments of West Indian varieties might in the future be made to California. Brief for Appellants, No. 45, pp. 62-63. But "Striking down a state law is not a matter of such light moment that it should be done by a federal

[8] Handlers are not aided on this point by their depositions which the district court treated as an offer of proof. R. 782. Harkness, in his deposition, testified that "the Waldins did not reach 8 percent [oil content] let's say, until December, which is the normal time for picking Waldins." R. 215 (O.P.); 782. If Waldins are excluded, the West Indian percentage of total shipments during the 1959-1960 season drops from 10.55 percent to 1.4 percent. D. Ex. E, R. 492, 643, 644, 782.

court *ex mero motu* on a postulate neither charged nor proved, but which rests on nothing but a possibility." *Everson* v. *Board of Education*, 330 U.S. 1, 4 n. 2.

The carefully reasoned district court opinion concluded after an exhaustive analysis of the record that: "It is not discriminatory treatment, but equality of treatment, of which plaintiffs [handlers] seem to complain." 197 F. Supp. 780, 787. This conclusion by the trial court that the California inspection statute has even-handed application renders inapposite such cases as *Hood & Sons* v. *Du Mond*, 336 U.S. 525. In *Hood & Sons*, New York had denied a milk handler the right to operate an additional milk receiving plant within the state because the plant would compete with existing local milk plants. 336 U.S. 525, 530-31. This denial was held invalid under the Commerce Clause because it had "the practical effect of curtailing the volume of interstate commerce to aid local economic interests." 336 U.S. 525, 530-31. In contrast, handlers in this case make no claim of discriminatory enforcement of the local inspection statute (R. 672-73) and the district court found no inherent discrimination in its application. R. 780. The legislative objective of the California inspection statute is the protection of consumers from the deceptive marketing of immature avocados, not the protection of local entrepreneurs. R. 628.

These facts bring this cause within the familiar principle that foods which are unfit for human con-

sumption "are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution." *Sligh* v. *Kirkwood*, 237 U.S. 52, 59-60. A host of decisions have applied this principle to varying factual situations. The common thread in each is that local inspection of foods intended for human consumption, to protect consumers, will be permitted where the interference with the national economy is justified by the importance of the resulting protection of community interests. Consistent with the Commerce Clause, a state may pass nondiscriminatory inspection laws regulating the introduction of diseased cattle and sheep within their borders (*Mintz* v. *Baldwin*, 289 U.S. 346; *Asbell* v. *Kansas*, 209 U.S. 251; *Reid* v. *Colorado*, 187 U.S. 137; *Rasmussen* v. *Idaho*, 181 U.S. 198; *Smith* v. *St. Louis & Southwestern Ry. Co.*, 181 U.S. 248; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U.S. 613), and preventing the sale of oleomargarine colored to look like butter (*Plumley* v. *Massachusetts*, 155 U.S. 461), and may require the disclosure of ingredients and correct labeling of foodstuffs brought into the state for sale (*Savage* v. *Jones*, 225 U.S. 501; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497).

State officers submit that the findings of the district court that the California inspection statute is *not* discriminatory, and therefore is valid under the Commerce Clause, is supported by the evidence. The California statute meets the test of constitutionality

stated by this Court in *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-44:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution'."

B. THE CALIFORNIA INSPECTION LAW DOES NOT DENY HANDLERS THE EQUAL PROTECTION OF THE LAWS.

In determining the constitutionality of Agricultural Code, Section 792, as applied to handlers in the light of the findings of the district court, this Court starts with the principle that the "prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

The California Legislature acted upon a rational basis in enacting the avocado inspection statute. The requirement of 8 percent oil content is reasonably designed for the legislative objective of keeping immature avocados off the market. R. 628, 631, 648, 666. The state statute does not create a special class. These handlers are subject to the same avocado oil content

standard as are all other persons who sell avocados in California.

Just as handlers' proof in the district court fails to support their claim of "inherent discrimination" under the Commerce Clause, it fails to support their claim of discrimination under the Equal Protection clause of the 14th Amendment.

III. The California Avocado Inspection Law Does Not Conflict With, and Is Not Pre-empted by, the Agricultural Marketing Agreement Act of 1937.

A. NO CONFLICT EXISTS BETWEEN THE FEDERAL AND STATE STATUTES.

The California avocado inspection statute was enacted by the State Legislature to prevent the marketing to consumers of immature, unpalatable fruit. R. 628. The three-judge district court found that:

> "To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit." 197 F. Supp. 780, 783.

The State's inspection statute, as applied to handlers, therefore falls within regulatory categories which, since colonial days, have been held appropriate to the local regulation of trade. See Article I, Section 10, Clause 2, of the Constitution; *Turner* v. *Maryland*, 107 U.S. 38, 51-54. Quarantine and other health measures, highway and safety laws, regulation of water-

ways and local public utilities, conservation and game laws, commodity inspection laws, all relate to matters of prime local concern which because of number and diversity may never be adequately dealt with by Congress. See *California* v. *Thompson*, 313 U.S. 109, 113; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177, 185. And even where Congress has acted, the exercise by a state of its police power is superseded only where the conflict is so direct and positive that the federal and state acts cannot be reconciled. *Sinnot* v. *Davenport*, 22 How. 227, 243.

Comparison of the federal and state statutes here involved show that no conflict *per se* exists between them. *Parker* v. *Brown*, 317 U.S. 341. The objective of Congress in enacting the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, was the establishment of orderly marketing conditions for agricultural commodities in interstate commerce so as to establish "parity prices" for farm products.[9] In the instant case, the announced objective of the marketing "self-help" program for growers and handlers of south Florida avocados was the tailoring of the supply of Florida avocados to the demand so that the prices received by Florida growers will equal or exceed parity. 19 F.R. 2419-20.

The California statute contains no reference to parity. Its legislative objective is entirely different

[9] Parity prices is a shorthand phrase for agricultural commodity prices which will accord farmers a purchasing power equivalent to the purchasing power held by them in a selected base period. See *United States* v. *Rock Royal Co-Op.*, 307 U.S. 533, 574-75.

since it is intended to protect consumers by preventing deception in the marketing of immature avocados. R. 628. See p. 25, *supra*. In comparison to the federal act which seeks to increase the monetary returns to growers, the state law primarily seeks to protect the interests of the consumer. Successful prevention of deception in the marketing of avocados in California will certainly not frustrate the attainment of the objectives of the federal statute and of the south Florida avocado marketing program. In fact, the "extremely good consumer acceptance of avocados" which the trial court attributed (187 F. Supp. at 786 n. 7) to California's avocado inspection statute should cause Florida growers to receive parity (or higher) prices for their avocados marketed in California.

B. CONGRESS DID NOT INTEND TO PRE-EMPT THE FIELD OF COMMODITY INSPECTION IN ENACTING THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937.

Section 10(i) of the federal act[10] provides:

> "The Secretary of Agriculture . . . is directed, . . . in order to obtain uniformity in the formulation, administration, and enforcement of Federal and *State programs* relating to the regulation of the handling of agricultural commodities, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities . . . to issue orders . . . complementary to orders or other

[10] Sec. 10(i) was added by 49 Stat. 750, 767, 7 U.S.C. 610(i). Appendix p. 33, *infra*.

regulations *issued by such authorities. . . .*" (Emphasis added.)

This section expressly shows the congressional intent that the states were to retain their traditional powers of commodity inspection. This construction of the act is emphasized by the committee reports of the Congress which enacted Section 10(i). These reports state:

> "This authorization is to carry out the declared policy of the title and looks to securing voluntary uniformity in the formulation, administration, and enforcement of State and Federal programs relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products."
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> * * * * *
>
> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the field of the States, for the limitations of the act and the Constitution forbid Federal regulation in that field, and this provision does not indicate the contrary. Nor is there anything in the provision to force States to cooperate. Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other." S. Rep. No. 1011, 74th Cong., 1st Sess. 15 (1935); compare H. R. Rep. No. 1241, 74th Cong., 1st Sess., 22-23 (1935).

This committee language, and in particular the reference to each sovereignty operating "in its own sphere," emphasizes that the powers given to the

Secretary of Agriculture were to be exercised concurrently with, and in co-operation with, the police powers of the states. Congressional debates on the act similarly show that local requirements were to remain effective. In response to a question on the floor of the House regarding the effect of the 1935 amendment [11] on New York milk regulations, Representative Martin Jones, Chairman, House Agricultural Committee, stated: "Within the state, of course, such laws may be enacted as the state deems proper. We do not undertake to keep them from shipping in, and we do not authorize them to ship in. We say when they ship from some other state, they must ship in subject to the same regulatory measures that exist in a particular area. In many instances the states may wish to enact supplementary legislation, if they wish to make the program fully effective." 79th Cong. Rec. 9465 (1935). Representative Andresen from Minnesota stated: "The farmers out in our section will have to meet the grade and sanitary requirements of the State of New York or the other states. . . ." 79th Cong. Rec. 9480 (1935).

[11] Section 8(3) of 48 Stat. 31, 35, had authorized the Secretary of Agriculture to license all handlers and processors engaged in handling agricultural commodities in interstate commerce. Such licenses could be revoked if such person violated the marketing regulations issued under the act. Section 8(3) was stricken out by 49 Stat. 750, 753, and replaced by Section 8(c) which authorized the issuance of marketing "orders" governing the handling of agricultural commodities in interstate commerce. The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, re-enacted Section 8(c), 7 U.S.C. 608c.

It was undoubtedly this clear language in the act, supported by its legislative history, which caused the Court to conclude that the marketing act "does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the commerce clause." *Hood & Sons* v. *Du Mond*, 336 U.S. 525, 542.

IV. The "Self-Help" Size and Weight Restrictions on the Shipping of Avocados Grown in South Florida Do Not Invalidate the California Consumer-Protection Avocado Inspection Law.

A. THE FEDERAL "SELF-HELP" AVOCADO REGULATIONS WERE NOT INTENDED TO SUPERSEDE LOCAL AVOCADO INSPECTION LAWS.

Handlers argue that compliance with the federal weight and size requirements for south Florida avocados (*E.g.*, 19 F.R. 4404) arms them with a sword with which to dispatch the California avocado inspection statute. But the language and the history of the federal avocado marketing regulations show that they were intended to have application only to the south Florida avocado growing area for the monetary benefit of the south Florida avocado industry, and were not intended to supersede state inspection laws designed for the protection of the local consumers.

The objective of the federal marketing act is the establishment, by exercise of the power conferred on the Secretary of Agriculture, of "orderly marketing conditions for agricultural commodities in interstate commerce," such as will tend to establish "parity

prices" for farm products. Agricultural Marketing Agreement Act of 1937, Sec. 2(1), 7 U.S.C. 602(1). Appendix, p. 55, infra. In order to raise the dollar returns on their avocados, Florida growers and shippers requested that the Secretary of Agriculture establish marketing regulations which would tailor "the supply of avocados available for sale in fresh market channels to the demand in such outlet. . . ." 19 F.R. 2419-20.

Following initiation of the marketing program by Florida growers and handlers (19 F.R. 909, 2418), the Secretary of Agriculture held a referendum limited to avocado growers located in south Florida. 19 F.R. 2789, 3439. In addition, Florida avocado handlers approved marketing agreements which were identical in form to the marketing order approved by Florida growers. 19 F.R. 909, 3439.[12]

Thereafter, the Secretary of Agriculture appointed a committee of Florida growers and handlers to administer the program. 7 C.F.R. 915.20. Members are selected from a slate nominated by the south Florida

[12] Section 8c(8) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(8), provides that no marketing order shall be effective unless first approved by either two-thirds of the producers of the commodity in the marketing area involved or by producers of two-thirds of the volume of the commodity produced in the marketing area involved. Approval by handlers handling 50 percent of the volume of the commodity produced in the production marketing area is also generally required. Section 8c(8), 8c(9). Section 8c(11)(B) requires that marketing orders "shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, . . . which the secretary finds practicable, consistently with carrying out such declared policy [of the act]." Appendix p. 60, infra.

avocado industry. 7 C.F.R. 915.22. Funds to finance the marketing program come from assessments levied on the south Florida avocado industry. 7 C.F.R. 915.40-.41. This marketing program, self-imposed and self-financed, must be terminated by the Secretary of Agriculture upon majority vote of the growers affected. Agricultural Marketing Agreement Act of 1937, Sec. 8c(16)(B), Appendix, p. 60, *infra*.

Harding, called as a witness by handlers, testified that the federal south Florida marketing program ". . . puts the control . . . of regulations into the hands of the growers, the handlers, the shippers. . . ." R. 558, 599-600. A confirming publication of the United States Department of Agriculture states:

> "The Act opens the way to wider use of self-help stabilization programs and reflects the desire of the administration and the intent of Congress to give farmers the legal tools needed to take active role in reducing the cost of farm programs and in preventing the accumulation of surpluses . . . The programs differ from other agricultural adjustment measures in that they combine voluntary and regulatory control—initiated, set up and directed by the industry. Each industry bears the cost of administering the program. The programs also demand aggressive group participation in their operation and development, with resultant interest and emphasis placed upon furthering agricultural private enterprise.
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> "Administration of programs for commodities other than milk is handled by a board of producers, or of producers and handlers selected by the Secre-

tary of Agriculture. Members may represent both producers and handlers and are selected from a slate recommended to the Secretary by the groups concerned." U.S. Dept. of Agriculture, *Self-Help Stabilization Programs*, 1, 5 (Nov. 1961).

In further elaboration, the United States Department of Agriculture explains:

"Marketing agreements and orders are designed to improve returns to growers through orderly marketing. They are self-help programs, through which fruit and vegetable growers can work together to solve marketing problems that they cannot solve individually.

"The [Marketing] Act itself does not impose regulations over the marketing of any agricultural commodity. *It merely provides the authority under which an industry can develop regulations to fit its own situation and solve its own marketing problems.*" (Emphasis added.) U. S. Dept. of Agriculture, *Marketing Agreements and Orders*, AMS-230, p. 3 (rev. ed. Nov. 1961).

In summary then, the administrative regulations, which handlers rely upon to strike down the California inspection law, originated with Florida growers and shippers of avocados.[13] It cannot be imagined that

[13] Handlers' offer of proof shows that the Secretary of Agriculture has always, without exception, followed the Avocado Administrative Committee's recommendations regarding the terms of the Secretary's maturity regulations governing the handling of avocados grown in south Florida. R. 206 (A.P.). From 1954 to 1956, handler corporations were represented on the Avocado Administrative Committee by Harold Kendall, President of South Florida Growers Association, Inc. (R. 191-92 (O.P.), 251 (O.P.)) and by Fred Piowaty, Secretary and Sales Manager of Florida Lime and Avocado Growers, Inc. (R. 191-92 (O.P.), 314 (O.P.)).

Congress intended these administrative marketing regulations "initiated, set up and directed by the industry" to be used as a weapon to strike down even-handed state inspection laws designed to protect local consumers from being deceived into buying immature fruit.

B. THE STATE INSPECTION STATUTE DOES NOT INTERFERE WITH THE ADMINISTRATION OF THE FEDERAL SOUTH FLORIDA MARKETING PROGRAM.

Section 8(e)(11)(B) of the federal act, 7 U.S.C. 608c(11)(B), provides that ". . . orders issued under this section shall be limited in their application to the smallest regional production area, or regional marketing areas, or both, as the case may be, which the Secretary [of Agriculture] finds practicable, consistently with carrying out such declared policy." Pursuant to this direction of Congress, the secretary limited the avocado program to avocados grown in specific counties in south Florida (7 C.F.R. 915.4) despite the fact that some avocados are commercially marketed from groves in north Florida. 19 F.R. 2420. Exceptions to the federal shipping regulations include (1) avocados grown in Florida but outside the controlled production area (7 C.F.R. 915.4), (2) daily shipments not exceeding 55 pounds (7 C.F.R. 915.55 (d), 915.140), (3) Christmas gift shipments not exceeding 20 pounds (7 C.F.R. 915.140), and (4) avocados "determined" by the Avocado Administrative Committee to be "mature" and granted an exemption certificate. 7 C.F.R. 915.110. No federal regulation is applied to avocados coming within these classes.

The operation of the federal avocado shipping restrictions, for those avocados which are regulated, ceases after the fruit leaves the specified south Florida counties constituting the area of production. 7 C.F.R. 915.4, 915.10, 915.54. Hence, there is no conflict in the administration in Florida of the federal avocado marketing program by subjecting these avocados to subsequent state inspection. It is well-established that such subsequent state inspection by a state made in protection of its consumers is constitutionally permissible. *Cloverleaf Co. v. Patterson,* 315 U.S. 148, 162.

In *Huron Cement Co. v. Detroit,* 362 U.S. 440, the boilers in appellant's vessels had been inspected by the Coast Guard and the vessels licensed pursuant to federal law. The City of Detroit commenced criminal proceedings under its smoke abatement code, after the necessary cleaning of the vessels' fires, while the vessels were docked at Detroit, caused the emission of excessive smoke. The city's code was held valid despite the fact that structural alterations would be required in order to comply with the code. Analysis of the federal boiler inspection law showed a congressional intent to afford protection to passengers and crew from the perils of maritime navigation, whereas the local inspection law was intended to eliminate air pollution to protect the health of the community. Id., at 445. Finding no conflict between the federal and local laws, the Court held that appellant's federal licenses availed it nothing, saying: "The mere possession of a federal license, however,

does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." Id., at 447.

Similarly, in the instant case, Congress has given no hint in the language of the federal marketing act that an avocado inspection certificate authorizing shipment of avocados from the controlled south Florida area of production, should immunize handlers from the California avocado inspection statute. Had Congress so intended, it could have used appropriate language. Thus for example, the act of March 3, 1905, 33 Stat. 1264, expressly provided that certificates of cattle inspection issued under the act authorized shipment of the cattle "without further inspection or the exaction of fees of any kind, ..." See *Mintz v. Baldwin*, 289 U.S. 346, holding that the New York dairy cattle quarantine law was valid and not in conflict with the act of March 3, 1905, 33 Stat. 1264.

Campbell v. Hussey, 368 U.S. 297, heavily relied upon by handlers, is inapposite. Brief for Appellants, No. 45, pp. 48-49. The Tobacco Inspection Act, 49 Stat. 731, 7 U.S.C. 511-511q, there construed, authorized the Secretary of Agriculture to establish type standards for domestic tobacco. Congress in the statute stated that "without *uniform standards* of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce;

that such fluctuations constitute a burden upon commerce and make the use of *uniform standards* of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein." (Emphasis added.) 7 U.S.C. 511a. The Court found in this language the congressional intent that there should be but one "uniform standard" of tobacco classification and that the federal statute thereby "preempted the field and left no room for any supplementary state regulation concerning those same types." *Campbell v. Hussey*, 368 U.S. 297, 301.

In sharp contrast, the Agricultural Marketing Agreement Act of 1937 provides for the establishment of farmer "self-help" commodity stabilization programs which are not uniform, but instead are tailored to fit the needs of the farmers in specific marketing or production areas. Thus Congress provided in Section 8c(11)(B) of the marketing act, 7 U.S.C. 608c(11)(B) that except in the case of milk, marketing orders "shall be limited in their application to the smallest regional production areas or regional marketing areas, . . . which the Secretary finds practicable. . . ." and in Section 8c(11)(C), 7 U.S.C. 608c(11)(C), required that regulations "applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms . . . as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas." Appendix p. 60, infra. Con-

gress thus expressly showed its intent that the regulations issued by the Secretary of Agriculture under the marketing act should not be uniform throughout the nation, but should be individually adopted to conform to the desires of the producers and handlers immediately concerned. It is clear that Congress did not intend to deprive states of their traditional powers to inspect commodities intended for local consumption. See p. 34, *supra*.

Again handlers rely on an inappropriate precedent in citing *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148. In this case an Alabama inspection statute establishing standards for "renovated butter" was held to conflict with the federal renovated butter inspection and tax statutes, Int. Rev. Code of 1954, Sec. 4811-18, 68A Stat. 571, formerly Int. Rev. Code of 1939, Sec. 2320-27, 53 Stat. 252. The conflict found by the Court was twofold: (1) the state confiscation prevented any subsequent federal regulation, and (2) state confiscation destroyed a product intended to be subsequently taxed by Congress. The Court in its opinion distinguished between the case where a state statute "interferes with production under federal supervision" and state "confiscation after production because of a higher standard demanded by a state for its consumers. *The latter type is permissible under all the authorities*". (Emphasis added.) *Cloverleaf Co.* v. *Patterson*, 315 U.S. 148, 162. The Alabama inspection statute would have been held valid had it applied to the finished butter product subsequent to federal in-

spection and regulation. This is made clear in the Court's statement: "But, of course, if any of the finished product is offered for sale in Alabama, such product becomes immediately subject to the requirements of the pure food laws of that state." 315 U.S. 148, 167.[11] As the district court below pointed out, 197 F. Supp. at 788, *Cloverleaf Co.* v. *Patterson* supports the validity of the California avocado inspection statute since the operation of the federal south Florida avocado shipping restrictions cease after the avocados leave the south Florida area of production (7 C.F.R. 915.4, 915.51, 915.61) and before operation of the California inspection law at California wholesale produce terminals. R. 630.

These considerations compel the conclusion that the federal act here involved does not prevent enforcement of the State's avocado law.

V. The Evidenciary Rulings of the District Court are Not Before this Court for Review.

Handlers and state officers stipulated in writing that handlers might take the depositions of certain witnesses in Florida. R. 144 (O.P.). The stipulation provided that the depositions "when taken may be read and used in evidence . . . subject to the same

[11] In *Cloverleaf*, 315 U.S. 148, 157-58, the Court cited *Savage* v. *Jones*, 225 U.S. 501 in which it was held that Indiana could validly apply its statute requiring disclosure of formulas on foods offered for sale in the state because the incidence of the federal Pure Food and Drugs Act, 34 Stat. 768, had occurred prior to state regulation.

objections and exceptions as if the said witnesses were personally present on the stand. . . ." (Stipulation of Counsel, dated January 9, 1958, attached to the transcript of depositions, and filed as part of the original record herein).[15] Handlers at the trial made no effort to read the deposition testimony into the record, but instead offered the depositions, totaling 205 pages in the printed record, and attached exhibits,[16] totaling another 92 pages, into evidence *en masse*. R. 146-351 (O.P.), 353-445 (O.P.), 576. State officers promptly objected on the grounds that the depositions should be read by handlers question and answer at a time, and that the exhibits be offered into evidence individually, in order that state officers would have proper opportunity to make specific objection. R. 576. Fed. R. Civ. P. 26(d), 26(e); *Los Angeles Trust Deed & Mtg. Exch.* v. *Securities & Exchange Comm'n*, 264 F. 2d 199, 212-13 (9th Cir.). The district court reserved ruling on the admissibility of the depositions and attached exhibits pending the filing of written argument by counsel. R. 576, 625, 683-85. State officers' objections were renewed at the conclusion of handlers' case in chief (R. 625) and at the conclusion of the trial. R. 683-85.

[15] The parties, through their respective counsel of record, on January 29, 1962, filed with the Court their stipulation authorizing reference in briefs and argument to the original record in this cause, including any portion which has not been printed.

[16] Plaintiffs' (handlers') exhibits for identification 1 to 22.

Following the receipt of the briefs of counsel (*e.g.* R. 692-756), the district court in a post trial formal order ruled:

> "2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish are *not* admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;
> "3. Plaintiffs' exhibits for identification 1 through 26, are *not* admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs . . . ." (Emphasis added.) R. 782.

Plaintiffs' (handlers') exhibits 23, 24, 25 and 26 for identification were also offered into evidence *en masse* by handlers. R. 603.[17] The district court reserved its ruling on their admissibility (R. 603), having previously ruled that such evidence to be immaterial. R. 574, 577. After considering state officers' objections that these exhibits constituted (1) inadmissible hearsay, (2) inadmissible secondary evidence of the contents of other writings, and (3) were irrelevant, the district court excluded defendants' exhibits 23, 24, 25 and 26 for identification from evidence. R. 722-726, 782.

Neither in the questions presented, nor in the text, does the Brief for Appellants question the correctness of these evidenciary rulings by the district court. They

[17] Plaintiffs' (handlers') exhibit 23 for identification was marked for identification at R. 576. Plaintiffs' (handlers') exhibits 24, 25 and 26 for identification were marked for identification at R. 583. These exhibits may be found at R. 445-87, although excluded from evidence. R. 782.

may not therefore question on this appeal the correctness of these rulings. U.S. Sup. Ct. Rules, 40(1)(d)(2); *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 177-79, aff'd, 305 U.S. 124; *Roth* v. *United States*, 354 U.S. 476, 490 n. 27.[18]

At the trial, handlers took the position that their depositions and attached exhibits became evidence in the case because state officers made reference to them in their original motions to dismiss in the district court. R. 61, 99, 563, 575; *Florida Lime & Avocado Growers* v. *Jacobsen*, 169 F. Supp. 774, reversed 362 U.S. 73. The district court denied this contention of handlers and ruled that the depositions and attached exhibits were not in evidence. R. 575.

This ruling of the district court that the depositions and exhibits were not placed in evidence by the earlier proceedings was manifestly correct. See *United States* v. *City of Brookhaven*, 134 F.2d 442, 447 (5 Cir.). The reference to handlers' depositions and attached exhibits in state officers' earlier motions to dismiss (R. 60-61, 98-99) was proper since the district court is permitted to inquire by affidavit and deposition into the facts as they exist when the question of its jurisdiction is raised. *Land* v. *Dollar*, 330 U.S. 731, 735 n. 4. State officers' concessions that the district court could look at the contents of the depositions and exhibits were made only for the purpose of question-

[18] In *Paul* v. *Florida Lime*, No. 49, this term, the Brief for Appellants at pages 14-23 and 27-46, deals with the evidentiary objections sustained by the district court to handlers' depositions and attached exhibits.

ing the equity jurisdiction of the district court, and certainly were not intended to be a waiver of state officers' right to object to evidence offered by handlers at the trial. The rule in analogous cases is that such concessions are provisional for the purposes of the motion only. *M. Snower & Co.* v. *United States*, 140 F.2d 367, 370 (7th Cir.), motion for judgment on the pleadings; *Bognaud* v. *White*, 170 F.2d 323, 327 (6th Cir.), motion for summary judgment; *Propo Corp.* v. *Pressure Can Corp.*; 234 F.2d 700, 703 (7th Cir.) cert. denied, 352 U.S. 892, motion for summary judgment. Handlers cite no authority, nor has any precedent been found, to support the novel assertion that state officers waived their evidenciary objections by the filing of motions to dismiss.

There is no occasion here to treat the action of the trial court, in reserving its ruling on the admissibility of handlers' depositions and attached exhibits, as "plain error not presented" under Rule 40(1)(d)(2), Revised Rules of the Supreme Court. Handlers, upon state officers' objection, were under a duty to read the depositions line by line into the record. Fed. R. Civ. P. 26(d), 26(e). *Los Angeles Trust Deed & Mtg. Exch.* v. *Securities & Exchange Comm'n*, 264 F.2d 199, 212-13 (9th Cir.). A deposition is not an instrument and, unlike documentary evidence, it cannot be offered in evidence as a whole, without reading it. The reason is that the examination ordinarily takes place before an officer without the qualifications or the authority to hear objections or rule out inadmis-

sible matter. Similarly the deposition may be taken for purposes of discovery as well as for use as evidence. Hence, in introducing a deposition, it is necessary that the parties be given an opportunity to object to or move to strike out individual questions or answers. The court in fairness to the parties should rule on the objections. This necessitates the reading of the deposition into the record. Neither the district court, nor this Court on appeal, has the burden of sifting through the 205 pages of depositions in the printed record and the additional 134 pages of exhibits (R. 146-351 (O.P.), 353-487 (O.P.)), in order to separate out those portions which might be relevant under the issues in the cause, and admissible into the record under the rules of evidence.

Further, the record indicates that it was *handlers* who requested that the district court defer ruling on the admissibility of the depositions and exhibits to the post trial argument of counsel. R. 646. Any error was thus invoked at the instance of handlers, who cannot now assert prejudice. See *Mercelis* v. *Wilson*, 235 U.S. 579, 583; *United States* v. *St. Louis Trans. Co.*, 184 U.S. 247, 249.

Lastly, as previously summarized, *supra* pages 10-11, the district court reserved the state officers the right to adduce rebutting evidence in the event it should be subsequently decided that handlers' depositions and exhibits are admissible into evidence. R. 782; 197 F. Supp. 780, 782 n. 2. If, arguendo, error was committed, the Court on this appeal cannot look to the

contents of handlers' depositions and exhibits for the purpose of deciding the merits of the cause, but must reverse and remand for further proceedings in the district court. *Idaho and Oregon Land Co.* v. *Bradbury,* 132 U.S. 509, 518. In any further proceedings, state officers would then have an opportunity to introduce their refutatory testimony. R. 707-712.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

I. The Applicable Portions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as Amended, 7 U.S.C. 601, et seq., Provide:

Sec. 2. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow.

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623 and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets and (b) authorizing no action under sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623 and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

* * * * *

Sec. 8c Orders regulating handling of commodity.

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable; single commodities and separate agricultural commodities.

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof . . . fruits . . . .

* * * * *

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order

which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided,* That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds

of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement.

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601—604, 607, 608, 608a, 608b,

608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623, and 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability.

No order shall be issued under this section unless it regulates the commodity or product covered thereby in the same manner as, and is ma[illegible] applicable only to persons in the respective classes of industrial or com-

mercial activity specified in a marketing agreement upon which a hearing has been held. . . .

(11) Regional Application.

* * * * *

(B) Except in the case of milk and its products orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

* * * * *

Sec. 8c 16) Termination of orders and marketing agreements.

* * * * *

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such

representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have during such representative period produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

Sec. 10. Administration.

* * * * *

(i) Cooperation with State authorities; imparting information.

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601—604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f—612, 613, 614—619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be nec-

essary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided,* That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title.

II. References in Handlers' Brief to Matters Not in Evidence.

Examination of handlers' statement of the case, as well as the argument portion of their brief, shows an almost total absence of "appropriate references to the printed record" as required by Supreme Court Rule 40(1)(e). *Houston* v. *Southwestern Tel. Co.*, 259 U.S. 318, 325. When references are given, they are to matters not in evidence, such as (1) documents which were not even offered into evidence (e.g. defendants' deposition exhibits P, Q, R and S for identification, R. 498-99, 500, 501, 502-04), (2) deposition transcripts and attached exhibits which were offered but excluded from evidence (R. 146-445 (O.P.), 782), and (3) statements made during the trial by counsel for handlers e.g. Brief for Appellants, p. 9, referring to R. 622-623. Many page citations are to exhibits without citation to the page num-

ber in the record where the exhibit was offered or received in evidence. For example, handlers' brief on pages 16 and 17 merely refers to "(R. 356, 361)" which are to plaintiffs' exhibits 4 and 7 for identification. These exhibits were offered at R. 575-76 and excluded at R. 782. In many instances, handlers make statements with no record citations whatsoever. *E.g.*, Brief for Appellants, 6, 7.

The depositions and attached exhibits offered in evidence by handlers (R. 576) but excluded from evidence (R. 782), were considered by the district court as an offer of proof. R. 782. An offer of proof, even though set forth in the printed record, can be considered on appeal only "for the single purpose of passing upon the exceptions taken to the admission or rejection of parts of . . . [the evidence], and not for the purpose of deciding whether the whole evidence supported the findings of the [trial] court." *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 518; *Buckstaff* v. *Russell*, 151 U.S. 626, 633-38. Neither in handlers' Jurisdictional Statement in No. 45, nor in the Brief for Appellants in No. 45, do handlers assign error to the ruling of the district court excluding from evidence handlers' depositions and the attached exhibits. Therefore, the references to the contents of handlers' offer of proof made in the Brief for Appellants which are directed to the merits of the posed constitutional issues are improper and should be disregarded. U.S. Sup. Ct. Rules, 40(1)(e), 40(2); *Houston* v. *Southwestern Tel. Co.*, 259 U.S. 318, 325. For these reasons, handlers' statement of the case in critical passages misstates the record.

For example, the only reference to the record supporting the statements made on page 7 of the Brief

for Appellants is to "R. 254." This reference is to the deposition of Harold E. Kendall (R. 251-(O.P.)) which was expressly excluded from evidence by the district court. R. 782. Page 8 of handlers' brief cites plaintiffs' exhibit 3 for identification, found at R. 355, which was excluded from evidence. R. 782. Also cited on page 8 are the depositions of David M. Biggar (R. 146 (O.P.), 151-152 (O.P.)), Fred Piowaty (R. 314 (O.P.), 315-316 (O.P.)), and R. M. Wimbish (R. 332 (O.P.), 349-350 (O.P.)). These depositions of Biggar, Piowaty and Wimbish, offered in evidence by handlers, were excluded from evidence by the district court. R. 782. On page 9, handlers' brief again cites the deposition of Biggar (R. 207) which was excluded from evidence. R. 782. Also cited on page 9 are the statements of counsel for handlers (R. 622-623) and plaintiffs' exhibit 9 for identification (R. 364) which was excluded from evidence by the district court. R. 782.

Handlers' brief on pages 10 to 12 discusses in detail the deposition by Roy W. Harkness (R. 208-50 (O.P.)), offered in evidence by handlers (R. 576) but excluded from evidence by the district court. R. 782. In the course of their discussion of the contents of the excluded deposition of Harkness, handlers cite on page 11 of their brief to their exhibit 16 for identification (R. 389-437 (O.P.)), which was offered in evidence by handlers (R. 576) but excluded from evidence. R. 782. In the footnote on page 11, on page 12, and in the footnote on page 13, handlers refer to the deposition of Harkness (R. 208-50 (O.P.)) which was excluded from evidence. R. 782. Page 13 of this brief cites to plaintiffs' exhibits 4, 7, 9, 14 and 16 for identification. These exhibits for identification, offered

in evidence by handlers (R. 576), were excluded from evidence by the district court. R. 782.

Pages 13 and 14 contain statements regarding the oil content of the Waldin and Booth varieties of avocados with supporting citations to plaintiffs' exhibits 4 and 7 for identification. R. 356-57 (O.P.), 361-62 (O.P.). These exhibits are not in evidence. R. 782. The statements regarding the Lula, Booth 7, Hickson, Booth 1 and Taylor varieties of avocados on pages 15-17 in handlers' brief are also cited to pages in the record on which appear plaintiffs' exhibits 4 and 7 for identification. R. 356-57 (O.P.), 361-62 (O.P.). Handlers' brief on page 15 also cites the deposition of Kendall (R. 257 (O.P.)), plaintiffs' exhibit 17 for identification (R. 438-439 (O.P.)), and plaintiffs' exhibit 21 for identification. R. 443-444 (O.P.). The deposition and exhibits were excluded from evidence by the district court. R. 782.

Page 18 of handlers' brief continues the practice of citing to matters not in evidence. This page of the brief cites to plaintiffs' exhibit 22 for identification (R. 445 (O.P.)), offered in evidence by handlers (R. 576) but excluded from evidence by the district court. R. 782. Again, handlers rely on the depositions of Harkness and Piowaty, although excluded from evidence (R. 782), in their discussion on page 18 of the oil content of Florida avocados. In the footnote on page 19 of their brief, handlers cite to interrogatories (R. 48-51, 58-59) which were neither offered nor received in evidence by the district court. Handlers refer to the excluded deposition of Kendall (R. 251-314 (O.P.)) in support of the contentions made on page 20 of their brief regarding the marketing of Florida avocados in California.

In connection with the testimony of Harding, handlers' brief on page 22 relies on the contents of plaintiffs' exhibit 23 for identification (R. 446-67 (O.P.)) which was excluded from evidence by the district court. R. 782. On page 23, handlers' brief gives the citation "(R. 452)," which is also a reference to the excluded plaintiffs' exhibit 23 for identification. The brief on page 23 makes reference to plaintiffs' exhibit 24 for identification (R. 468-77 (O.P.)) which was excluded from evidence. R. 782. Handlers' brief on page 24 also refers to plaintiffs' exhibit 25 for identification (R. 478-85 (O.P.)) without any acknowledgment that this exhibit was expressly excluded from evidence by the district court. R. 782. Pages 25 to 27 of the brief contain summaries of excluded exhibit 25 for identification and therefore improperly refer to matters not in evidence.

The Brief for Appellants on page 28 refers to "(R. 482)" which is a portion of excluded plaintiffs' exhibit 25 for identification. R. 478-85 (O.P.), 782. Also, this page cites and quotes from excluded plaintiffs' exhibit 26 for identification. R. 486-87 (O.P.), 782. Page 29 of the brief does not contain a single reference to the record. Page 30 makes reference to plaintiffs' exhibits 1 and 2 for identification (R. 353 (O.P.), 354 (O.P.)) which were excluded from evidence. R. 782. Handlers on this page cite to "R. 441-442," which it develops, is a reference to plaintiffs' exhibits 19 and 20 for identification (R. 441 (O.P.), 442 (O.P.)) which were excluded from evidence. R. 782. Page 30 also refers to "defendants' exhibits P, Q, R and S." R. 498-99, 500, 501, 502-04. These exhibits were marked for identification by the attending notary public during the taking of the depositions of Kendall and Piowaty. R. 281(O.P.), 305

(O.P.), 329 (O.P.). The exhibits were neither offered in evidence by the parties, nor received in evidence by the district court.

Handlers on page 31 of their brief cite (1), to plaintiffs' exhibits 12 and 13 for identification (R. 371-74 (O.P.), 375-78 (O.P.)), (2), to "R. 257-262", a portion of the deposition of Kendall, and (3), to "R. 317-18", a portion of the deposition of Piowaty. As noted before, these exhibits and depositions were excluded from evidence. R. 782. Page 31, in addition, refers to plaintiffs' exhibits 17 and 21 for identification. R. 438-39 (O.P.), 443-44 (O.P.). These exhibits, also, are not in evidence. R. 782. Page 32 of handlers' brief for the statements there made, cites only the excluded deposition of Piowaty (R. 318-31 (O.P.), 782), and "R. 502," a reference to defendants' exhibit 8, an exhibit neither offered nor received in evidence. R. 502-04.

Similarly, the only citations to the record given on page 33 of handlers' brief are to the excluded deposition of Kendall. R. 251-314 (O.P.), 782. The reference "R. 438-439" on page 34 of the brief is to plaintiffs' exhibit 17 for identification (R. 438-39 (O.P.)), which was excluded from evidence. R. 782. Again, on page 38 of their brief, handlers cite the contents of plaintiffs' excluded exhibits 4, 7 and 25 for identification. R. 356-57 (O.P.), 361-62 (O.P.), R. 478-85 (O.P.), 782.

The Brief for Appellants on page 47 cites to plaintiffs' exhibits 12, 13, 17, and 21 for identification, which were excluded from evidence by the district court. R. 371-74 (O.P.), 375-78 (O.P.), 438-39 (O.P.), 443-44 (O.P.), 782. On page 64 of their brief, handlers cite to the excluded deposition of Harkness. R. 208-50 (O.P.), 782. Handlers at page 65 argue from matters

in plaintiffs' excluded exhibits 17 and 21 for identification. R. 438-39 (O.P.), 443-44 (O.P.), 782. Similarly, on page 66 of their brief, handlers allude to their excluded exhibits 16 and 25 for identification. R. 389-437 (O.P.), 478-85 (O.P.), 782. Handlers' brief on page 67 cites to plaintiffs' exhibit 17 for identification, an exhibit not in evidence. R. 438-39 (O.P.), 782.

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